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No. 05-1608

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

RONALD LEE ABBOTT, *et al.*,

Petitioners,

v.

A-BEST PRODUCTS COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF WEST VIRGINIA, KANAWHA COUNTY

BRIEF IN OPPOSITION FOR RESPONDENT VIAD CORP

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QUESTION PRESENTED

Are state common-law tort claims against manufacturers of locomotive equipment preempted by the Boiler Inspection Act – enacted with congressional intent to occupy the entire field of locomotive regulation – when such claims relate to the design, construction, or material of locomotives or their parts?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Viad Corp has no parent corporation, and there is no publicly held company that owns ten percent or more of its stock.

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JURISDICTION

This Court can have jurisdiction under 28 U.S.C. § 1257(a) only if it treats the within petition as directed to the Circuit Court of Kanawha County rather than, as styled by petitioners, to the West Virginia Supreme Court of Appeals, as it is evident that "the highest court . . . in which a decision could be had" was the Circuit Court.[1]

STATEMENT OF THE CASE

Petitioners' Statement of the Case misstates two of the three questions certified to the West Virginia Supreme Court of Appeals, and distorts and omits procedural history relevant to certain of petitioners' legal arguments.

Petitioners and others allegedly similarly situated commenced mass asbestos litigation in West Virginia asserting, *inter alia*, state-law product defect and failure to warn claims against certain defendant manufacturers, distributors, and suppliers of locomotives and locomotive and railcar parts for purported injuries resulting from alleged exposure to asbestos-containing products. Some defendants, including respondent Old Orchard Industrial Corp., the successor to Vapor Corp, a manufacturer of locomotives and locomotive parts[2], moved for summary judgment on the ground that the Boiler Inspection Act (BIA)[3] preempted petitioners' claims; other defendants,

[1] The petition should nevertheless be dismissed for lack of jurisdiction because the decision below is not final under 28 U.S.C. § 1257(a) inasmuch as it does not conclude the litigation as to all causes of action and all parties.

[2] Respondents Viad Corp and General Motors Corp., likewise manufacturers of locomotives and locomotive parts, were not parties to the litigation at that time.

[3] The BIA is now called the Locomotive Inspection Act (LIA) and is also referred to in some court decisions as the FLIA or LBIA. It is referred to herein as the BIA.

which manufactured and supplied brakes for both locomotives and railcars, filed summary judgment motions on preemption grounds pursuant to the Safety Appliance Act (SAA) and the Federal Railroad Safety Act (FRSA) as well as the BIA.

The motions were denied; however, the Kanawha County Circuit Court certified the following three questions – two of which petitioners misquote in their petition (Pet. 1) – to the West Virginia Supreme Court of Appeals:

> 1. Are state tort claims against manufacturers of parts or components of trains, locomotives, railcars, and similar vehicles used on any railroad, which is engaged in interstate or foreign commerce, preempted by federal law under the Safety Appliance Act, 49 U.S.C. § 20301 *et seq.*?
>
> 2. Are state tort law claims against manufacturers of parts or components of trains, locomotives, railcars, and similar vehicles used on any railroad, which is engaged in interstate or foreign commerce, preempted by federal law under the Federal Railroad Safety Act, 49 U.S.C. § 20101 *et seq.*?
>
> 3. Are state tort law claims against manufacturers of parts or components of railroad locomotives preempted by federal law under the Locomotive Boiler Inspection Act, 49 U.S.C. § 20701 *et seq.*?

Following the West Virginia Supreme Court's grant of review, respondent Viad was permitted to intervene as a party appellant and participated fully thereafter in the briefing and argument of the appeal along with Old Orchard and the two brake manufacturers. Ultimately, the West Virginia Supreme Court answered the third question – implicating only the BIA – in the affirmative, holding that "[b]ecause this finding makes

consideration of the first two questions unnecessary, we decline to answer them." *In re West Virginia Asbestos Litigation*, 215 W. Va. 39, 41 (2003). Petitioners then filed an application for rehearing, agreeing that only the third certified question needed to be answered "with regards to the LBIA [defendants] Vapor[4] and Viad" but arguing that such was not the case as to the brake manufacturers (neither of which is a respondent herein).[5] Respondent's Appendix A, page 2a. Petitioners thus conceded that consideration only of the BIA – not the SAA or the FRSA – was required to determine whether petitioners' claims against Vapor and Viad were preempted.

The application for a rehearing was denied as to all parties. Respondent's Appendix B. Subsequently, respondent Viad's motion for summary judgment was granted by the Kanawha County Circuit Court in reliance on the holding in *In re West Virginia Asbestos Litigation* and judgment entered in its favor on July 27, 2005.[6] Petitioners' Appendix A. On March 15, 2006,

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[4] *i.e.*, Old Orchard.

[5] Petitioners explained: "Vapor and Viad (or their predecessors) manufactured locomotive and/or locomotive components that contained asbestos. The other two [defendants], Railroad Friction Products Corporation (RRFPC) and American Standard, Inc. (ASI) manufactured and supplied rail car and locomotive brakes which at certain times in the past contained asbestos. . . . ¶Vapor moved for summary judgment on the claims below solely on the basis of the [BIA] . . . as that act is germane only to locomotives. . . . RRFPC and ASI, on the other hand, moved for summary judgment on the claims below on the basis of **both** the [BIA] and the [SAA] . . . as those companies made or distributed a product that was used both on locomotives and rail cars" (emphasis in original). Respondent's Appendix A, pages 1a-2a.

[6] The motions of respondents Old Orchard and General Motors, which had by then become a party to the West Virginia asbestos litigation, were also granted. The Circuit Court held in part in its two orders that:

(Cont'd)

the West Virginia Supreme Court denied the petition seeking leave to appeal from the Circuit Court's final judgment. Petitioners' Appendix B.

SUMMARY OF ARGUMENT

There is no issue that warrants this Court's review. *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605 (1926), holds that the BIA, now codified at 49 U.S.C. §§ 20701-20903 (1994), occupies the field of all matters "within the scope of the authority delegated to the [Interstate Commerce] Commission" – now the Secretary of Transportation – including "the design, the construction and the material of every part of the locomotive," *i.e.*, the "entire locomotive . . . and all parts and appurtenances thereof." *Id.* at 608, 611, 613. The BIA therefore preempts all state law – including common-law tort claims against locomotive equipment manufacturers – in the field, as it must. Otherwise, railroads would have to change locomotives and their parts as trains crossed state lines or conform to the rule of the most exacting state, a burden Congress deemed intolerable.

Napier disposes of the case at bar. Petitioners' state-law claims attack the locomotive "design" that called for asbestos, the "construction" that used it, and the "materials" themselves,

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(Cont'd)

"(1) The parties agree that the claims asserted against [respondents] are based on the alleged exposure to asbestos from locomotives and locomotive parts manufactured, sold, and/or supplied by [respondents]"; "(2) The West Virginia Supreme Court of Appeals has determined that any and all tort claims based on the alleged exposure to asbestos from locomotives and locomotive parts are preempted by federal law under the [BIA]. . ."; and "(4) Each and every individual claim asserted against . . . Vapor and Viad in the . . . consolidated civil action" and "[a]ll of the claims asserted against GM in each and every one of these civil actions are preempted by federal law under the [BIA]. . . ." Petitioners' Appendix A.

and petitioners do not claim otherwise. They accordingly fall squarely within the Secretary's authority and so, the West Virginia Supreme Court and Kanawha County Circuit Court properly held, within the preempted field.

That is true whether the state law under which the duty is imposed is common-law or not, and is also true whether the claim is made against the railroad operator or the locomotive manufacturer. It has been settled for 45 years that tort claims are designed to regulate and affect conduct in the same manner as statutes and regulations, and so tort claims are preempted just as statutes and regulations are. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) ("The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."). Moreover, the BIA speaks to "manufacturer[s] . . . of railroad equipment"; thus, the manufacturers that design and construct locomotives and their parts are necessarily at the center of that field and, as a practical matter, state law imposing duties on manufacturers must be preempted, lest the uniformity required by federal law be destroyed.

The petition therefore presents no issue meriting the exercise of this Court's certiorari jurisdiction. The decision of the Kanawha Circuit Court following that of the West Virginia Supreme Court in *In re West Virginia Asbestos Litigation* does not conflict with a decision of this Court or of any federal or state appellate court. Four circuit courts – the Ninth, Eighth, Sixth, and Second Circuits – and three state supreme courts – Alabama, California, and Ohio – have previously considered the precise question presented here, *see infra* at pp. 10-12, and all reached the identical conclusion: state common-law tort claims against locomotive manufacturers are preempted by the BIA pursuant to *Napier*. Moreover, the state cases all concerned asbestos. So settled is the preemptive scope of the BIA as to

petitioners' claims that this Court has denied certiorari to review the decisions of four of these courts – the Second Circuit in *Oglesby v. Delaware & Hudson Ry. Co.*, 180 F.3d 458 (2nd Cir. 1999), *cert. denied sub nom. Oglesby v. General Motors Corp.*, 528 U.S. 1004 (1999); the Sixth Circuit in *Springston v. Consolidated Rail Corp.*, 130 F.3d 241 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998); the Ohio Supreme Court in *Darby v. A-Best Prods. Co.*, 102 Ohio St. 3d 410 (2004), *cert. denied*, 543 U.S. 1146 (2005)[7]; and the California Supreme Court in *Scheiding v. General Motors Corp.*, 22 Cal. 4th 471, *cert. denied*, 531 U.S. 958 (2000) – as well as the decision of the Indiana Court of Appeals in *In re Train Collision at Gary, Indiana*, 670 N.E.2d 902 (Ind. App. 1996), *appeal denied sub nom. Dillon v. Chicago Southshore & South Bend R. Co.*, 683 N.E.2d 591 (Ind.), *cert. denied sub nom. Dillon v. Northern Indiana Commuter Transp. Dist.*, 522 U.S. 914 (1997).

In short, *Napier*'s application here presents no conflict, or important question, or any question truly in dispute at all.

REASONS FOR DENYING THE PETITION

I. *Napier v. Atlantic Coast Line R. Co.*: Congress Intended Completely to Occupy the Field of Locomotives and Locomotive Parts

For 80 years, since Justice Brandeis's opinion for a unanimous Court in *Napier*, it has been settled that Congress intended the BIA to preclude all state law respecting locomotives and locomotive parts and equipment used in interstate commerce. *Id.*, 272 U.S. 605.

Napier held that Congress intended the BIA "to occupy the field" in respect to all areas subject to the BIA, and that the BIA

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[7] *Darby*, where this Court most recently denied certiorari, relied in considerable part on *In re West Virginia Asbestos Litigation.*

accordingly preempted all state law within the BIA's grant of authority to the Interstate Commerce Commission – whose successor is the Secretary of Transportation, via the Federal Railroad Administration[8] (FRA). *Id.* at 611, 613. Those areas encompass "the entire locomotive and tender and all parts and appurtenances thereof," including "the design, the construction and the material of every part." *Id.* at 608, 611. The Court found that the BIA conferred on the Commission "general" power to regulate locomotive safety equipment and that the BIA's grant to the Commission of that general power preempted all state law falling within the scope of the Commission's authority. *Id.* at 611-13.

The Court further found that the state laws at issue were "within the scope of the authority delegated to the Commission" by the BIA, *id.* at 611, and so were preempted regardless whether they conflicted with a federal rule, or whether there was any applicable federal rule at all:

> **It is also urged that, even if the Commission has power to prescribe** an automatic fire box door and a cab curtain, **it has not done so, and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance.** The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the act delegating power. We hold that state legislation is precluded, because the Boiler

[8] In 1966 the power originally granted to the ICC was transferred to the Secretary of Transportation. Department of Transportation Act, Pub. L. No. 89-670, § 6(e)(1), 80 Stat. 931 (1966). *See generally Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1152 (9th Cir. 1983). The FRA, a part of the Transportation Department, exercises this power. 49 C.F.R. § 1.49(c)(5), (g) (2004).

> Inspection Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the commission leads to that conclusion. . . . [R]equirements by the States are precluded, however commendable or however different their purpose.

Napier, 272 U.S. at 613 (emphasis added). In sum, "[i]f the protection now afforded by the Commission's rules is deemed inadequate, application for relief must be made to it." *Id.*

Congress preempted the field for good reason. Locomotives must cross state lines routinely, so the subject "is peculiarly one that calls for uniform law." *See Pennsylvania R. v. Pub. Service Comm'n*, 250 U.S. 566, 569 (1919) (Holmes, J.) (mail cars).

> This broad preemptive sweep is necessary to maintain uniformity of railroad operating standards across state lines. Locomotives are designed to travel long distances . . . through interstate commerce. The virtue of uniform national regulation "is self-evident: locomotive companies need only concern themselves with one set of equipment regulations and need not be prepared to remove or add equipment as they travel from state to state."
>
> * * *
>
> If each state were to adopt different liability-triggering standards, manufacturers would have to sell locomotives and cars whose equipment could be changed as they crossed state lines, or adhere to the standard set by the most stringent state. Either way, Congress' goal of uniform, federal railroad regulation would be undermined.

Law v. General Motors Corp., 114 F.3d 908, 910-11 (9th Cir. 1997) (Kozinski, J.) (citation omitted); *accord Springston*, 130

F.3d at 245; *Swift & Co. v. Wickham*, 230 F. Supp. 398, 407-08 (S.D.N.Y. 1964) (Friendly, J.), *appeal dismissed*, 382 U.S. 111 (1965), *aff'd*, 364 F.2d 241 (2nd Cir. 1966), *cert. denied*, 385 U.S. 1036 (1967); *Scheiding*, 22 Cal. 4th at 483.

Petitioners suggest (Pet. 13-14) that *Law* misapplied federal preemption principles by examining the effect of state regulations on the federal goal. This type of analysis, petitioners claim, "does not properly belong to the doctrine of field preemption" but, rather, to that of conflict preemption. *Law*, however, got the preemption analysis exactly right, merely explaining the self-evident and practical reason Congress intended the BIA to occupy the field and displace all state law. *See, e.g., United Transp. Union v. Long Island R. Co.*, 455 U.S. 678, 687-88 (1982) ("Railroads have been subject to comprehensive federal regulation for nearly a century. . . . Moreover, the Federal Government has determined that a uniform regulatory scheme is necessary to the operation of the national rail system."). Indeed, Congress itself, long before *Law*, articulated the importance of uniform, federal laws relating to railroad safety: "Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106 (FRSA).[9] So too did the FRA:

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[9] In enacting the FRSA, 49 U.S.C. § 20101 *et seq.*, in 1970, Congress reaffirmed that under the BIA, and five other laws, "where the Federal Government has authority, with respect to rail safety, it preempts the field"; Congress stated in 1970 that these laws "have served well" and "chose to continue [them] without change." H.R. Rep. No. 91-1194 (1970), reprinted in 1970 U.S.C.C.A.N. 4104, 4105, 4108. In recodifying the BIA and other transportation laws in 1994 without substantive change, Congress expressly preserved "the precedent value of earlier judicial decisions," such as *Napier*. Revision of Title 49, Transportation, U.S.C., Pub. L. No. 103-272, §§ 1(a), 6(a), 108 Stat. 745, 1378 (1994); H.R. Rep. No. 103-180, at 3, 5 (1994), reprinted in 1994 U.S.C.C.A.N. 818, 820, 822.

> [I]t is essential that the safety of railroad operations be the responsibility of a single agency and that that agency undertake new initiatives in an informed and deliberate fashion, weighing the impact of particular proposals on longstanding industry practices and pre-existing regulations. . . . ¶ [I]t is the judgment of the agency that piecemeal regulation of individual hazards . . . by any other agency of government would be disruptive and contrary to the public interest.

Dep't of Transp., FRA, *Railroad Occupational Safety and Health Standards; Termination*, 43 Fed. Reg. 10,583, 10,585-86 (March 10, 1978). Respondent's Appendix C.

II. An "Avalanche" of Federal and State Appellate Case Law Holds that the BIA Preempts Common-Law Claims Against Locomotive Manufacturers

The West Virginia Supreme Court of Appeals correctly held that, through the BIA, Congress "occupied the field of railroad safety so pervasively" that "any other path" was "blocked by an avalanche of adverse authority from other jurisdictions, both state and federal." *In re West Virginia Asbestos Litigation*, 215 W. Va. at 43. Accordingly, the Kanawha Circuit Court's decision granting summary judgment in reliance upon this holding is unassailable.

A nearly unbroken line of federal and state appellate authorities follow *Napier* without exception and hold that the BIA preempts state common-law and statutory claims against railroad operators and locomotive manufacturers related to the design, construction, or material of locomotives and their parts – the field the BIA occupies. *Forrester v. American Dieselelectric, Inc.*, 255 F.3d 1205 (9th Cir. 2001) (BIA preempts non-employee product liability actions against manufacturer of

locomotive cranes); *Law, supra* (9th Cir.) (quoting *Garmon;* BIA preempts design defect and failure to warn claims against manufacturer concerning engine insulation and brake noise); *Marshall, supra* (9th Cir.) (BIA preempts common-law claims for failure to install warning devices on locomotive) (Kennedy, J.); *First Security Bank v. Union Pacific R. Co.*, 152 F.3d 877 (8th Cir. 1998) (BIA preempts state common-law remedies against railroad manufacturers for injuries arising out of alleged design defects); *Springston, supra* (6th Cir.) (BIA preempts common-law claims against manufacturer); *United Transp. Union v. Foster*, 205 F.3d 851 (5th Cir. 2000) (BIA preempts statute requiring engine be equipped with signal devices); *Missouri Pacific R. Co. v. Railroad Comm'n of Texas*, 833 F.2d 570 (5th Cir. 1987) (BIA preempts state requirement for emergency equipment); *Consolidated Rail Corp. v. Pennsylvania Pub. Util. Comm'n*, 536 F. Supp. 653 (E.D. Pa.), *aff'd*, 696 F.2d 981 (3rd Cir. 1982), *aff'd*, 461 U.S. 912 (1983) (BIA preempts state statute requiring locomotive speed indicators); *Oglesby, supra* (2nd Cir.) (BIA preempts employee common-law claims against locomotive seat manufacturer); *General Motors Corp. v. Kilgore*, 853 So. 2d 171 (Ala. 2002) (BIA preempts claims against manufacturer for use of asbestos in locomotive parts); *Norfolk Southern Ry. Co. v. Denson*, 774 So. 2d 549 (Ala. 2000) (BIA preempts state-law claim seeking to hold locomotive manufacturer liable for failure to install air conditioning); *Scheiding, supra* (Cal.) (BIA preempts railroad workers' tort claims against manufacturer for asbestos-related injuries); *Mickleson v. Montana Rail Link, Inc.*, 999 P.2d 985 (Mont. 2000) (BIA preempts common-law claims against railroad concerning locomotive equipment); *Darby, supra* (Ohio) (BIA preempts railroad workers' asbestos claims against locomotive manufacturers); *In re West Virginia Asbestos Litigation, supra* (W. Va.) (BIA preempts state tort law claims

against manufacturers of locomotives and asbestos-containing parts and components thereof).[10]

Astoundingly, petitioners virtually ignore this overwhelming authority and instead devote nearly two pages (Pet. 11-13) to a discussion of one anomalous case, *Lorincie v. Southeastern Pennsylvania Transp. Auth.*, 34 F. Supp. 2d 929 (E.D. Pa. 1998), which, according to petitioners, properly declined to "broadly stretch the preemption umbrella of the LBIA to cover actions against [manufacturers]" given the "requirement that Congress's intent to preempt state police powers be 'clear and manifest,' and the strong presumption against preemption in the area of health and safety." Pet. 13.

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[10] *See also Key v. Norfolk Southern Ry. Co.*, 228 Ga. App. 305 (1997) (BIA preempts common-law claims against railroad by employee injured in fall from locomotive steps); *Central of Georgia R. Co. v. Markert*, 200 Ga. App. 851, *cert. denied*, 200 Ga. App. 895 (1991) (same); *Dillon (In re Train Collision), supra* (Ind. App.) (BIA preempts common-law claims against manufacturer); *Furlough v. Union Pacific R. Co.*, 766 So. 2d 751 (La. App. 2000), *writ denied*, 781 So. 2d 556 (La. 2001) (BIA preempts negligence claim based on inoperative ditch lights); *Carter v. Consolidated Rail Corp.*, 126 Ohio App. 3d 177, *appeal denied*, 82 Ohio St. 3d 1413 (1998) (BIA preempts common-law claims arising from alleged asbestos exposure); *In re Amtrak "Sunset Limited" Train Crash in Bayou Canot, Alabama, on September 22, 1993*, 188 F. Supp. 2d 1341 (S.D. Ala. 1999) (BIA preempts passenger and employee common-law negligence and design defect claims against manufacturer); *Roth v. I&M Rail Link, L.L.C.*, 179 F. Supp. 2d 1054 (S.D. Iowa 2001) (BIA preempts state common-law tort claims against manufacturer in action brought by widow of employee crushed in collision); *Eldridge v. Missouri Pacific R. Co.*, 832 F. Supp. 328 (E.D. Okla. 1993) (BIA preempts negligence claim based on inadequate locomotive warning devices); *Seaman v. A.P. Green Ind., Inc.*, 184 Misc. 2d 603 (N.Y. Sup. Ct. 2000) (cited by the West Virginia Supreme Court in the case at bar, and in *Darby* and *Kilgore*; BIA preempts common-law asbestos claims against manufacturer).

Petitioners' reliance on *Lorincie* is misplaced for a number of reasons. First, this Court has unequivocally held that there is no "'assumption' of nonpre-emption . . . when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000). Thus, "there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers" (*id.*), and respondents need not "overcome the 'strong presumption'" that petitioners' claims fall outside the preempted field.[11] Second, Congress's "clear and manifest" intent to occupy the field – "the entire locomotive and tender and all parts and appurtenances thereof," including "the design, the construction and the material of every part" – and preempt state police powers has been well established since *Napier*. *Scheiding*, 22 Cal. 4th at 475, 482; *see also Darby*, 102 Ohio St. 3d at 418; *Law*, 114 F.3d at 913 ("Through the BIA, the federal government has established a comprehensive, national regime of locomotive

[11] In addition to *Lorincie*, petitioners (Pet. 9) cite *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992), for this presumption. But *Cipollone* concerned "'smoking and health' . . . with regard to cigarette labeling," *id.* at 518, a subject traditionally of state rather than national interest. To the contrary, *Napier* itself establishes that the BIA preempts health and safety laws with respect to locomotives and their parts – historically a federal concern. The states therein defended their laws on the ground that they sought to "prevent sickness and disease." *Id.*, 272 U.S. at 612. But this Court held they were preempted "however commendable or however different their purpose." *Id.* at 611-13. In other words, because locomotive regulation is historically a federal field, no presumption against preemption exists merely because petitioners claim personal injury. *See, e.g., Buckman v. Plaintiffs' Legal Committee*, 531 U.S. 341, 347-48 (2001) (no presumption against preemption of personal injury claim said to stem from fraud on federal agency; "Policing fraud against federal agencies is hardly 'a field which the States have traditionally occupied' . . . 'such as to warrant a presumption against finding federal pre-emption of a state-law cause of action.'") (citations omitted).

regulation. This regime – enforced by [the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* (FELA)] and the threat of heavy civil penalties – preempts every state effort to establish independent standards for the design, construction and material of locomotives.").

Finally, *Lorincie* relied in substantial part on *Viad Corp v. Superior Court*, 64 Cal. Rptr. 2d 136 (Ct. App. 1997), which was thereafter expressly overruled by the California Supreme Court in *Scheiding*, and on *Oglesby v. Delaware & Hudson Ry. Co.*, 964 F. Supp. 57 (N.D.N.Y. 1997), which was thereafter reversed by the Second Circuit. *Lorincie* was expressly rejected by the Second Circuit in *Oglesby*, 180 F.3d at 462, and has not been favorably cited in any reported decision. Indeed, every reported case to consider *Lorincie* has rejected it. *Oglesby*, 180 F.3d at 462; *Roth*, 179 F. Supp. 2d at 1061; *Kilgore*, 853 So. 2d at 176.

III. *In re West Virginia Asbestos Litigation* Does Not Conflict With Decisions of This Court

Petitioners contend (Pet. 3-8) that the West Virginia Supreme Court's decision upon which the Kanawha Circuit Court relied in granting summary judgment "directly conflicts" with this Court's decisions in two respects: first, as to the scope of SAA and BIA preemption under *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33 (1916), *Moore v. Chesapeake & Ohio Ry. Co.*, 291 U.S. 205 (1934), and *Gilvary v. Cuyahoga Valley Ry. Co.*, 292 U.S. 57 (1934), and second, as to the nature of federal preemption generally under *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), and *English v. General Electric Co.*, 496 U.S. 72 (1990).

Petitioners begin their first argument by wrongly conflating the SAA and the BIA – "Any analysis regarding the scope of the federal preemption under the LBIA must necessarily begin

with a discussion of the history of [the SAA]" (Pet. 4); "Taken as a whole, [this Court's] decisions in *Napier*, *Moore*, and *Gilvary* clearly define the scope of preemption under the LBIA and SAA" (Pet. 6) – and then undertaking an analysis of the **SAA** under *Rigsby*, *Moore* and *Gilvary* and erroneously concluding that the **BIA** does not preempt their claims. The purported logic of petitioners' argument is that: (1) although the BIA and SAA must be read *in pari materia* with FELA, the SAA was enacted first, before the BIA and FELA[12]; (2) the SAA prescribed the duty or standard of care in the field of railroad safety but did not set forth rules governing the enforcement of any rights, leaving common-law actions intact; (3) *Gilvary*, decided after *Napier*, held that the SAA did not preempt state workers' compensation laws; (4) *ergo*, the scope of preemption under the SAA and, somehow, under the BIA "is limited to the establishment of standards, and does not foreclose actions . . . by railroaders and passengers . . . to the extent [such actions] do not seek to impose a standard different from, or which in any manner conflicts with, the standards imposed by Congress through the LBIA and the SAA." Pet. 6.

To the contrary, the language of *Gilvary* clearly shows that this Court's citation of *Napier* was intended to **contrast** the SAA and the BIA in effect in 1911 from the BIA as amended in

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[12] The BIA and SAA are considered amendments to the FELA. *Urie v. Thompson*, 337 U.S. 163, 189 (1949) ("the [SAA], together with the [BIA] are substantively if not in form amendments to the [FELA]. They dispense, for the purposes of employees' suits, with the necessity of proving that violations of the safety statutes constitute negligence; and making proof of such violations is effective to show negligence as a matter of law. Thus taken, as has been the consistent practice, the [BIA] and [SAA] cannot be regarded as statutes wholly separate from and independent of the [FELA]. They are rather supplemental to it, having the purpose and effect of facilitating employee recovery, not of restricting such recovery or making it impossible.").

1924 and construed in *Napier*. What the Court stated in *Gilvary* was this:

> The power conferred upon the Congress is such that when exerted it excludes and supersedes state legislation in respect of the same matter. But Congress may so circumscribe its regulation as to leave a part of the subject open to state action. *Atlantic Coast Line v. Georgia*, 234 U.S. 280 [1914]. . . . ***Cf.*** *Napier v. Atlantic Coast Line*. . . . The purpose exclusively to regulate need not be specifically declared. *New York Central R.R. Co. v. Winfield*, 244 U.S. 147 [1917]. . . . But ordinarily such intention will not be implied unless, when fairly interpreted, the federal measure is plainly inconsistent with state regulation of the same matter. *Illinois Cent. R.R. Co. v. Public Utilities Comm.*, 245 U.S. 493 [1918].

Gilvary, 292 U.S. at 60 (emphasis added).

The comparison the Court invites in *Gilvary* between *Atlantic Coast Line R. Co. v. Georgia*, from 1914, and *Napier*, from 1926, shows that what the Court was driving at in *Gilvary* is entirely different from what petitioners herein urge the case means. The 1914 case concerned lights in a locomotive, and the Court held that the SAA and the BIA as then in effect included no explicit regulation of such lights, so the states were free to adopt their own. But the BIA was thereafter amended, and here is what this Court had to say on the issue in *Napier*:

> Does the legislation of Congress manifest the intention to occupy the entire field of regulating locomotive equipment? Obviously it did not do so by the Safety Appliance Act, since its requirements are specific. It did not do so by the original Boiler Inspection Act, since its provisions were limited to

> the boiler. *Atlantic Coast Line R. Co. v. Georgia.* . . . But the power delegated to the Commission by the Boiler Inspection Act **as amended** is a general one. It extends to the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances.

Napier, 272 U.S. at 611 (emphasis added). Obviously, then, just as this Court in *Napier* contrasted the rule applicable to *Atlantic Coast Line R. Co. v. Georgia* with that applicable to *Napier*, so did the Court in *Gilvary*. In fact, the language of *Gilvary* citing *Napier* stands for exactly the opposite proposition from that for which petitioners cite it.

Indeed, if petitioners' thesis were true, and over 80 years of precedent had erroneously interpreted the scope of preemption under the BIA, this Court surely would not have declined the opportunity to correct that error by denying certiorari **five** times in the past nine years. Instead, this Court has implicitly, and repeatedly, reconfirmed the correctness of over two dozen federal and state appellate court decisions applying *Napier* and finding that the BIA preempts state common-law tort claims.

Petitioners' reasoning is not only incorrect, it is irrelevant. This is a BIA case, not an SAA case. The SAA grants federal regulatory authority over specific parts of locomotive railcars such as automatic couplers, hand brakes, sill steps, ladders, grab irons, handholds, and running boards[13]; the BIA, however, grants authority over the **entire** locomotive. Because the BIA preempts petitioners' claims (*see* pp. 6-12, *supra*), the SAA is beside the point, as the West Virginia Supreme Court of Appeals – **and petitioners themselves**, in their application for rehearing (*see* p. 3 and footnote 5, *supra*) – properly concluded.

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[13] The SAA is now codified at 49 U.S.C. §§ 20301-20306 (1994).

Petitioners' second argument (Pet. 6-9), pursuant to *Silkwood* and *English*, likewise fails. Far from being "remarkably analogous to the situation which is currently before this Court" (Pet. 7), *Silkwood* found no congressional intent to preclude an award of punitive damages under the Atomic Energy Act in light of the overall statutory scheme. *Id.*, 464 U.S. at 250-55. By contrast, *Napier* long ago established that "Congress indeed manifested the intention to 'occupy the entire field of regulating locomotive equipment.'" *Darby*, 102 Ohio St. 3d at 418; *Scheiding*, 22 Cal. 4th at 481. Petitioners reject this clear distinction and instead maintain that "a court must still scrutinize the individual nature of the claims at issue to determine whether or not they frustrate the federal objective and fall within the preempted field." Pet. 7. However, "[i]f Congress evidences an intent to occupy a given field, any state law falling within that field is preempted." *Silkwood*, 464 U.S. at 248. Thus, Congress's relevant "intent" in occupying the field is "to exclude state regulation" from the field, so any state law in the field, including petitioners' common-law claims, necessarily "frustrate[s] the federal objective" and conflicts with that intent, and is therefore preempted. *English*, 496 U.S. at 79-80 n.5.[14]

The California Supreme Court explained it best:

> [U]nlike the situation in *Silkwood*, the field occupied by the BIA must necessarily extend to state law tort

[14] *See also Cipollone*, 505 U.S. at 521 (quoting *Garmon*, 359 U.S. at 246-47). This Court has repeatedly held since *English* that ordinary preemption principles apply to common-law damage actions. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 868-69, 874 (2000) (products liability claim preempted; "ordinary pre-emption principles, grounded in longstanding precedent" dating back at least to *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), will continue to be applied in determining whether or not there is "pre-emption of state tort suits"); *Buckman*, 531 U.S. at 352 (common-law claim for personal injuries preempted; "ordinary" preemption principles applied).

> recovery. That is, the BIA cannot remove "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances" from the purview of state regulation without concomitantly precluding tort actions premised on a defect in such design, construction, or material. Any other result would place regulation of these in the hands of state juries, thereby constraining the Secretary of Transportation's regulatory authority and undermining the goal of uniformity.

Scheiding, 22 Cal. 4th at 480.

IV. Petitioners Have a Potent Remedy Under FELA

Petitioners' contention (Pet. 14-15) that preemption of their state tort claims "ignores a number of factual scenarios in which a plaintiff will not have any other avenue of recovery available to him" is not an issue in this case. Petitioners are all current or former railroad employees, and so eligible to bring FELA claims against their former employers. *See In re West Virginia Asbestos Litigation*, 215 W. Va. at 43 n.2 ("the arguments of counsel lead us to believe . . . that all the plaintiffs have a remedy against the railroads under the Federal Employers' Liability Act. . ."). "This remedy is strong medicine." *Law*, 114 F.3d at 912. Under it, a worker may recover the same compensatory damages as are available at common law where "employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 506 (1957). FELA demonstrates how Congress intended railroad workers injured on the job would be compensated, and shows why its decision to preempt is sensible.

In any event, petitioners' argument goes nowhere. Federal law occupies the field and alone can impose duties. *See Spinelli v. Gaughan*, 12 F.3d 853, 858 (9th Cir. 1993) ("Once Congress

has chosen to preempt the state claim, it's free to give affected individuals a full federal claim, a claim providing only for remedies limited to equity, a damages claim only, **or no claim at all**.") (emphasis added).[15]

As to petitioners' other contention (Pet. 15-16), regarding contribution and indemnification claims by common carriers, *Norfolk & Western Ry. Co. v. Ayers*, *supra*, provides no support for petitioners' position that railroad workers should be able to pursue direct actions against locomotive manufacturers for "LBIA liability." Indeed, this Court unequivocally demonstrated the lack of need for such a remedy, and the rationale behind the absence thereof, by reiterating in *Ayers* that "the FELA does not authorize apportionment of damages between railroad and nonrailroad causes." *Id.*, 538 U.S. at 159-60. That is to say, FELA defendant railroads are 100 percent liable to their employees, although the railroads, in turn, "may bring

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[15] Thus, in *Forrester*, 255 F.3d at 1209-10, the Ninth Circuit expressly rejected the plaintiff's argument "that *Law* preempts only claims by railroad employees, not persons who have no remedy under the [FELA]." *Forrester* observed that *Marshall*, *First Security*, and *Springston* all had previously "held a common-law claim of a motorist against a railroad arising out of a crossing accident, to the extent it was based on the railroad's inadequate warning devices, [to be] preempted by the Act." *Id.* Accordingly, even as against railroads, all common-law claims within the preempted field are barred by the BIA; and only railroad workers can obtain BIA relief under FELA. There is therefore nothing particularly remarkable about the determination that, because of BIA field preemption, all common-law claims of whatever nature against locomotive manufacturers – which are not subject to FELA – should likewise be barred. In sum, railroad workers have a statutory remedy, but only against their employers, which are 100 percent liable through FELA. *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 165-66 (2003). For all others – such as passengers, motorists, and bystanders – BIA field preemption simply precludes all remedies against both railroads and manufacturers.

indemnification and contribution actions against third parties. . . ." *Id.* at 162. This is a clear statement that, pursuant to the FELA statutory scheme, railroad employees are required to seek their damages from their railroad employers.[16]

V. Decisions by the Seventh Circuit Court of Appeals and the Minnesota Supreme Court Do Not Undercut the Avalanche of Authority Foreclosing Petitioners' State Tort Claims

Petitioners (Pet. 18-19) cite two BIA cases – *Adkins v. Illinois Central R. Co.*, 326 F.3d 828 (7th Cir. 2003), and *Engvall v. Soo Line R. Co.*, 632 N.W.2d 560 (Minn. 2001) – which they argue are in "direct conflict" with the West Virginia Supreme Court. *Adkins*, however, is irrelevant, and *Engvall*, although wrongly decided, actually bars petitioners' state-law claims.

Adkins appears to have conflated field preemption, which is a defense that can be raised whether the case is pending in federal or state court, with complete preemption, which is a doctrine governing the removal of cases from state to federal court. The only issue in *Adkins* was whether the action, brought under the BIA through FELA, was properly removed on the ground that Congress "clearly intended completely to replace state law with federal law and create a federal forum" at the

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[16] *Ayers* holds both that the railroad employee has rights only against his employer the railroad and that the railroad may bring indemnification and contribution actions against third parties (such as manufacturers) only where such a right is provided under an "**otherwise applicable** state or federal law" (emphasis added). *Id.* This language begs the question before the Court. Inasmuch as BIA field preemption bars all suits against manufacturers relating to locomotive equipment, parts, and materials, perforce no law permitting indemnification or contribution is "otherwise applicable." Accordingly, *Ayers* certainly gives the injured employee no right of action against the manufacturer in such a case.

same time. *Id.* at 835, quoting *Vorhees v. Naper Aero Club, Inc.*, 272 F.3d 398, 403 (7th Cir. 2001). Inasmuch as it is plain that a BIA claim can be brought only through FELA, under which there is concurrent federal and state-court subject-matter jurisdiction, the Seventh Circuit's decision in *Adkins* cannot fairly be understood as undercutting *Napier* or any of the other federal or state appellate decisions – none of which the Seventh Circuit discusses or even cites – that have consistently upheld the defense of BIA field preemption.

Indeed, unlike *Adkins*, *Vorhees* – written by the same circuit judge – clearly sets forth the difference between "complete" and other forms of preemption: "[T]he fact that a federal statute creates a defense to a state law claim does not necessarily mean that 'Congress has, by statute, taken the subject away from state tribunals and given it to federal courts.' . . . The question is whether, in enacting the Federal Aviation Act, Congress clearly intended completely to replace state law with federal law and create a federal forum, or, more likely, if it only intended to provide a federal defense to the application of state law." (Citations omitted.) *Id.* at 403. As Wright, Miller and Cooper explains, the "complete-preemption doctrine, which has been invoked in a significant – and ever-increasing – number of cases and contexts," has nothing to do with "the defense of federal preemption" as such but instead concerns the "removal to federal court" of "a narrow class of claims," even if framed by a "well-pleaded complaint" as "based solely on state law." 14B Wright, Miller and Cooper, *Federal Practice and Procedure* § 3722.1 (3rd ed.), "Cases Based on the Existence of a Federal Question: Complete Preemption." The rule of complete preemption – and thus the *Adkins* decision – is irrelevant to the case at bar.

Likewise unhelpful to petitioners, *Engvall* actually agrees with all of the other federal and state cases holding "that the field preempted by the LIA includes all state law respecting the

design, construction, or material of locomotives" and that "claims seeking to impose a state law standard of care on a manufacturer (or a railroad) are preempted" by the BIA. *Id.* at 569-71. But then *Engvall*, sidestepping field preemption, postulates the existence of a right of action under state common law for violating a federal standard of care under the BIA.[17] Among other errors, *Engvall* fails to consider that there is no basis in law for asserting a private right of action against a manufacturer – in that case, General Motors – for violating a BIA standard. Both the outcome and the reasoning of *Engvall* were expressly rejected in *Roth*, *supra*, as well as in *Union Pacific R. Co. v. Motive Equip., Inc.*, 714 N.W.2d 232, 236 (Ct. App. Wis. 2006), and *Bonner v. Union Pacific R. Co.*, No. CV03-134-S, 2005 WL 1593635, at *9-10 (D. Ida. July 6, 2005).[18]

In any event, *Engvall* does not assist petitioners in their assertion that asbestos tort claims can proceed against Viad under the BIA's federal standard of care. In *Engvall*, the Minnesota Supreme Court, construing its own holding in *Mahutga v. Minneapolis, St. Paul & Sault Ste. Marie Ry.*, 182 Minn. 362 (1931), held that "when the FRA has found a particular design of a part or appurtenance to be safe to operate as required by the LIA, a jury cannot find otherwise." *Engvall*, 632 N.W.2d at 567. That is exactly the case here, where the FRA's September 1996

[17] Petitioners' *Engvall* argument in this Court, that they might have a claim based on violation of the BIA itself, was neither properly raised nor passed on below. *See* Rule 14.1(g)(i).

[18] That *Ayers* cites *Engvall* in a footnote (Pet. 15-16) is of no moment. The reference, *Ayers*, 538 U.S. at 162 n.21, is merely a string citation collecting cases mentioned in an A.L.R.3d article and supplement – also cited in the footnote – authorizing separate suits for contribution by railroad FELA defendants. The mere inclusion of *Engvall* in this string cite cannot reasonably be read as this Court's imprimatur for the correctness of the Minnesota Supreme Court's holding under the BIA.

Report to Congress, mandated by a 1992 federal statute[19], found unequivocally that no asbestos regulations should be prescribed "to improve the safety and working conditions of locomotive cabs" because the presence of asbestos in older locomotives still on line posed no safety hazard to humans or the environment. *Report to Congress, Locomotive Crashworthiness and Cab Working Conditions* at 10-1, 10-12, 12-9. Respondent's Appendix D, page 11a. In the face of this FRA "on-point" determination that "locomotive components" containing asbestos are "safe to operate as required by the LIA," "a jury cannot find otherwise." *Engvall*, 632 N.W.2d at 567. For "a jury cannot be permitted to substitute its judgment in lieu of the judgment of the Commission, upon whom the law places the responsibility for such determination." *Mahutga*, 182 Minn. at 366. Accordingly, even if petitioners were correct in their general contention that state tort claims can be brought using BIA standards of care, such an approach would be barred insofar as asbestos in locomotives is concerned.

VI. The BIA Applies to Locomotives Whether They Are "On Line" or "Off Line"

Petitioners argue (Pet. 16-18) that the BIA is inapplicable because they allegedly were exposed to asbestos-containing products in connection with locomotives that were "off line." This proposition confuses two very different concepts under the BIA; the first of these is absolute liability, the second is field preemption. The decisions petitioners cite – all of which discuss only the first issue – have no bearing on the second. What these cases hold is that, under FELA, injuries from locomotives not "in use" are not subject to the BIA's absolute liability standard. But this concept has absolutely nothing to do with the question of whether, under the BIA, state common-

[19] *See* Rail Safety Enforcement and Review Act of 1992, Pub. L. No. 103-365, § 10, 106 Stat. 972 (1992).

law tort law is preempted and, for railroad workers, replaced by FELA.

Petitioners' argument is wrong on at least five counts:

(i) The federal field is defined not by **where** the regulation is applied but by **what** is regulated – the physical "object" of it. *Napier*, 272 U.S. at 611-13. The physical object of petitioners' claimed common-law rule is the locomotive and the design, construction, and material of its parts. Therefore, state regulation is preempted. *Id.*

(ii) Petitioners' premise is that a state can regulate a locomotive's design, construction, parts, or materials when the locomotive is being repaired off line, but not when it is in operation on line. That argument is metaphysical. A locomotive's design, parts, construction, and materials are the same on line or off.[20] Indeed, the job of off-line roundhouses is to put the locomotive and its on-line parts in condition to operate on line. Perhaps petitioners' thesis is that railroads must replace federally lawful on-line parts with state-lawful off-line parts while the parts are being repaired, and then replace the state-lawful off-line parts with the federally sanctioned on-line parts after the parts are repaired. Such a scheme is obviously utterly unworkable.

(iii) Any regulation of locomotive parts necessarily applies to the manufacturer upon delivery of the locomotive; "once they sell the train, it's out of their hands." *Law*, 114 F.3d at 912 n.3. State regulation of locomotive parts, whether applicable on line or off, would thus require the manufacturer to deliver – and,

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[20] *See Seaman*, 184 Misc. 2d at 607 (holding "irrelevant whether the plaintiff was exposed to asbestos from locomotives in use or 'off-line,' because a locomotive's design, construction, parts and materials, which are regulated by the BIA, are the same whether or not the locomotive is in use").

accordingly, the railroad to buy – a locomotive meeting the state regulation. That is exactly what preemption of state law forbids. *Cf. Law*, 114 F.3d at 910-11; *Carrillo v. ACF Ind., Inc.*, 20 Cal. 4th 1158, 1168-69 (1999); *Taylor AG Ind. v. Pure-Gro*, 54 F.3d 555, 562 (9th Cir. 1995) (state regulation could not regulate indirectly what it was preempted from regulating directly).

(iv) Petitioners' reasoning that the BIA applies to parts on line, but has nothing to do with the inspection and repair of them off line, is a *non sequitur*, indeed impossible. A locomotive and its parts could not meet federal standards on line if they were not inspected and repaired to be in compliance with them off line. Moreover, the FRA in fact regulates numerous off-line activities, including inspection, testing, maintenance, and repair; after all, the law is called an "Inspection Act." Indeed, the BIA commands that a locomotive not inspected, tested, and repaired while off line cannot be used at all on line. 49 U.S.C. § 20701(2).

(v) Petitioners' on-line cases are, finally, beside the point. None has anything to do with preemption, products liability, or even locomotive design. All involve FELA suits against railroads essentially alleging breach of the duty properly to maintain locomotives and their parts, and the issue is "at what point the railway becomes absolutely liable for injuries caused by defective equipment under the Act." *Angell v. Chesapeake & Ohio Ry. Co.*, 618 F.2d 260, 262 (4th Cir. 1980). These cases simply hold that the railroad's absolute duty to maintain under the BIA applies through FELA to the locomotive's operation on line, but not when it is in repair or at rest off line, for the very good reason that a locomotive while off line (perhaps for months) need not be in condition to operate on line. *See, e.g., Southern Ry. Co. v. Lunsford*, 297 U.S. 398 (1936) (rejecting plaintiff's claim that railroad violated BIA by failing properly to maintain experimental device not "part" or "appurtenance" of locomotive); *Phillips v. CSX Transp., Inc.*, 190 F.3d 285 (4th

Cir. 1999) (FELA/SAA claims dismissed; train not "in use" at time of injury); *Deans v. CSX Transp., Inc.*, 152 F.3d 326 (4th Cir. 1998) (SAA claim reinstated because train "in use" when plaintiff released hand brake; FELA claim dismissed); *Varney v. Norfolk & Western Ry. Co.*, 899 F. Supp. 280 (S.D.W. Va. 1995) (detached radio not "part" or "appurtenance" of locomotive; BIA therefore inapplicable to plaintiff's claims); *Trinidad v. Southern Pacific Transp. Co.*, 949 F.2d 187 (5th Cir. 1991) (SAA claim dismissed; brake provisions of SAA do not apply to trains during pre-departure inspection); *Pinkham v. Maine Central R. Co.*, 874 F.2d 875 (1st Cir. 1989) (affirming directed verdict in favor of railroad on BIA claim; locomotive not "in use" at time of injury); *Steer v. Burlington Northern, Inc.*, 720 F.2d 975 (8th Cir. 1983) (same); *Angell, supra* (verdict in favor of plaintiff on FELA/BIA claims affirmed where train "in use" because engine had passed inspection and been "okayed" for service); *Estes v. Southern Pacific Transp. Co.*, 598 F.2d 1195 (10th Cir. 1979) (affirming favorable FELA verdict and dismissal of BIA claim; locomotive not "in use" at time of injury).

In sum, petitioners' notion that states may regulate the design of locomotive parts off line would require railroads to meet conflicting state standards off and on line; or – assuming no conflict – either to meet the most stringent state regulation on and off line or not to repair locomotives needing repair in states whose most stringent off-line regulations the locomotive does not meet. Requiring locomotives to "adhere to the standard set by the most stringent state" would undermine "Congress's goal of uniform federal railroad regulation." *Carrillo*, 20 Cal. 4th at 1169 (citations omitted); *Oglesby*, 180 F.3d at 461. Deterring railroads from repairing locomotives in any state would make no sense at all, indeed would flatly violate Congress's mandate that locomotives be maintained and

promptly repaired wherever they go.[21] That would stand as an obstacle to the "accomplishment and execution of the full purposes and objectives of Congress," and accordingly be preempted on that ground as well. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 491-92 (1987).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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[21] The BIA mandates repair at the first facility on the route if a locomotive falls out of compliance; otherwise, the locomotive cannot be used to haul freight. 49 C.F.R. § 229.9(a), (b)(2). A state is preempted from imposing additional requirements as the price of federally -required maintenance. *See Xerox Corp. v. County of Harris, Texas*, 459 U.S. 145, 150-54 (1982) (state tax preempted because it would financially penalize acts federal law sought to foster); *Nash v. Florida Ind. Comm'n*, 389 U.S. 235, 240-41 (1967) (state law preempted because it discouraged act congressional policy sought to leave uninhibited; state cannot "retard, impede, burden or in any manner control the operations of the constitutional laws enacted by Congress") (citation omitted).

APPENDIX

APPENDIX A — APPELLEES' PETITION FOR REHEARING IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN RE: WEST VIRGINIA ASBESTOS LITIGATION
CIVIL ACTION NO. 02-C-9004
KANAWHA COUNTY CIRCUIT COURT

CASE NO.: 31237

APPELLEES' PETITION FOR REHEARING

[Tables Intentionally Omitted]

I. INTRODUCTION

These cases involve the claims of thousands of railroad employees against several manufacturers of railroad car and/or locomotive components for asbestos related injuries. Two of the appellants, Vapor and Viad (or their predecessors) manufactured locomotives and/or locomotive components that contained asbestos. The other two appellants, Railroad Friction Products Corporation (RRFPC) and American Standard, Inc.(ASI) manufactured and supplied rail car and locomotive brakes which at certain times in the past contained asbestos.

Appellant Vapor moved for summary judgment on the claims below solely on the basis of the Locomotive Boiler Inspection Act (LBIA), 49 U.S.C. §§ 20701, *et seq.* as that

act is germane only to locomotives. Appellants RRFPC and ASI, on the other hand, moved for summary judgment on the claims below on the basis of **both** the LBIA and the Safety Appliance Act (SAA), 49 U.S.C. §§ 20301, *et seq.* as those companies made or distributed a product that was used both on locomotives and rail cars.

* * *

II. ARGUMENT IN SUPPORT OF PETITION.

A. The First Certified Question Should Have Been Answered, And the Answer Should Have Been in the Negative.

As indicated above, this Court determined that answering the question with regards to the LBIA in the affirmative that it was unnecessary to answer the questions with regards to the SAA and the FRSA, further holding that "[b]ecause we hold that this statute [the LBIA] preempts the plaintiffs' claims against the defendant, we need not reach the other questions presented to us, and decline to answer them." *In re*: *West Virginia Asbestos Litigation*, at 12.

While the above quoted statement is true with regards to the LBIA appellants, Vapor and Viad it is not true with regards to appellants RRFPC and ASI. As indicated, the appellees have filed claims against RRFPC and ASI stemming from exposure to asbestos containing brakes used on **both** locomotives and rail cars. In answering the third question in the affirmative this Court effectively dismissed

claims stemming from exposure to products used on locomotives. However, this Court's decision on the third question in no way impacted claims against RRFPC and ASI stemming from exposure to products used on rail cars, nor could it, as the LBIA applies only to locomotives.

* * * *

APPENDIX B — ORDER OF THE SUPREME COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA DENYING PETITION FOR REHEARING DATED JANUARY 15, 2004

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 15th day of January 2004, the following order was made and entered:

In Re: West Virginia Asbestos Litigation

Civil Action No. 02-C-9004
Kanawha County Circuit Court

No. 31237

The Court, having maturely considered the petition for rehearing filed by the appellees, plaintiffs below, by Robert F. Daley, Mark T. Coulter, D. Aaron Rihn, Peirce Raimond & Coulter; and James F. Humphreys and David Cecil, their attorneys, on the 31st day of December, 2003, is of opinion to and doth hereby refuse said petition for rehearing. Justice McGraw and Judge Stone would grant.

A True Copy

Attest: s/ Rory L. Perry II
Clerk, Supreme Court of Appeals

APPENDIX C — EXCERPTS FROM DEPARTMENT OF TRANSPORTATION POLICY STATEMENT

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[49 CFR Part 221]
[Docket No. ROS-1, Notice 3]

RAILROAD, OCCUPATIONAL SAFETY AND HEALTH STANDARDS; TERMINATION

Policy Statement

* * *

Policy Concerning Exercise of Statutory Authority

A. Introduction

. . . . Therefore, it is essential that the safety of railroad operations be the responsibility of a single agency and that that agency undertake new initiatives in an informed and deliberate fashion, weighing the impact of particular proposals on long-standing industry practices and pre-existing regulations.

* * *

Appendix C

B. Exercise of FRA Jurisdiction Over Railroad Operations

* * *

. . . . While it is expected that additional regulatory initiatives may be undertaken, as necessary, in each of the major regulatory fields, it is the judgment of the agency that piecemeal regulation of individual hazards in any of the three regulatory fields by any other agency of government would be disruptive and contrary to the public interest.

* * *

Issued in Washington, D.C. on March 10, 1978.

John M. Sullivan,
Administrator.

APPENDIX D — REPORT TO CONGRESS OF THE U.S. DEPARTMENT OF TRANSPORTATION DATED SEPTEMBER 1996

U.S. Department of Transportation

Federal Railroad Administration

LOCOMOTIVE CRASHWORTHINESS AND CAB WORKING CONDITIONS

REPORT TO CONGRESS

Office of Safety Assurance and Compliance

September 1996

* * *

CHAPTER 10

Other Factors Affecting Locomotive Cab Working Conditions

FRA examined locomotive crew exposure to vibration and asbestos. Vibration can cause visual acuity problems and, when significant and/or combined with other factors, physiological effects. FRA conducted a review of open literature on the subject matter, and this chapter provides a summary of the findings.

* * *

Appendix D

The two primary locomotive manufacturers stopped using asbestos in their locomotives in the 1970's, and FRA has not identified sources of friable asbestos to which crew members could be exposed. Based on this fact and the small number of earlier vintage locomotives still in use, asbestos is not considered an issue.

In addition to the working conditions addressed in previous chapters, FRA also evaluated two other factors that are not currently covered in FRA regulations, but which can affect the working conditions aboard locomotives–vibration and asbestos. This chapter discusses the source of vibration and asbestos in current locomotives, the health and safety effects associated with their presence, and recommended actions to minimize or eliminate these effects on the performance of the locomotive crew.

* * *

OSHA: Final Asbestos Rules[14]

In the August 10, 1994 *Federal Register*, OSHA published final regulations to protect workers from exposure to asbestos. The rules, which cover four million workers and are estimated to cost $361.2 million annually, went into effect on October 11, 1994. This OSHA rule applies to railroad operating employees.

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14. Occupational Hazards, Sept 1994, OSHA: Final Asbestos Rule Covers 4 Million Workers.

Appendix D

At a press conference at OSHA headquarters, Assistant Secretary of Labor (OSHA), Joseph A. Dear said the rules will ensure effective long-term management of asbestos. OSHA has reduced the permissible exposure limit (PEL) from 0.2 fibers per cubic centimeter of air as an 8-hour time-weighted average to 0.1 fibers per cubic centimeter.

Asbestos in the Locomotive Cab

When steam generators were used on locomotives in passenger service, asbestos cement was used to insulate the heater coils to prevent loss of heat and contain the fire. Whenever the steam generator was disassembled and the coils had to be removed, the asbestos cement was broken up and removed, releasing asbestos particles which could be inhaled into the lungs. This source of asbestos was eliminated in the 1970's, when the head end power system was developed for the heating of passenger trains with electricity.

GE and EMD, the two primary manufacturers of current locomotives, made the following statements regarding asbestos in their locomotives:

- GE[15] stated that asbestos has not been permitted in any facet of their locomotive production since October 1979. In addition, GE stated that there is no record of asbestos ever being used in the cab environment of its

15. Mr. R. Shults, Manager-Product & Environment Impact, General Electric Company (GE).

locomotives. Further, GE informed each of their outside suppliers in mid-1987 that all sub-assemblies provided for the production of locomotives must be free of asbestos.

- EMD[16] stated that of their 12 specifications for sound and thermal insulation applications, only one contained asbestos as a filler with a resin bonded fiberglass and only fiberglass was used as a loose insulating material. An EMD service bulletin was issued on April 6, 1984, prohibiting the use of asbestos for any purpose in locomotive construction. This restriction also is applied to outside contractors supplying sub-assemblies for the production of locomotives. In the 1970's, EMD began to curtail the use of asbestos in locomotive construction depending upon the location. EMD had identified 60 pages of part numbers which contained asbestos in some form in previous locomotive construction; however, these parts have been discontinued.

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16. Mr. Widdman, Electro Motive Division (EMD).

Appendix D

Conclusions

FRA has reviewed literature outlining the known health and safety effects of asbestos exposure, and contacted representatives from both primary locomotive manufacturers regarding the present and past use of asbestos in the construction of locomotives. While previous locomotive design incorporated the use of asbestos, and older locomotives remaining in service may still contain limited amounts of asbestos, there is no evidence that the presence of asbestos poses a problem to humans or the environment. The use of asbestos in locomotive production was terminated many years ago, and both primary manufacturers currently have policy statements prohibiting the use of asbestos in locomotive construction. Based on the above, FRA does not feel that further action with respect to the presence of asbestos in locomotive cabs is warranted at this time.